

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN SCHLABACH,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

No. CV-09-298-FVS

ORDER DENYING
RECONSIDERATION

THIS MATTER comes before the Court based upon Plaintiff John Schlabach's motion for reconsideration. He is representing himself. The Internal Revenue Service is represented by Christopher J. Williamson.

BACKGROUND

The Internal Revenue Service ("IRS") has commenced more than one investigation of John Schlabach. During 2009, he learned the IRS has placed four letters in his file. The letters allegedly relate to tax shelters. He denies he wrote the letters or authorized anyone to send them on his behalf. Consequently, he demanded the IRS remove the letters from his file. When the IRS refused, he commenced an action pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a *et seq.* The IRS moved to dismiss his complaint on the ground Congress has stripped district courts of jurisdiction over Privacy Act claims such as his:

The provisions of subsections (d)(2), (3), and (4), and (g) of section 552a of title 5, United States Code, shall not be

1 applied, directly or indirectly, **to the determination of the**
2 **existence or possible existence of liability (or the amount**
3 **thereof) of any person for any tax,** penalty, interest, fine,
4 forfeiture, or other imposition or offense to which the
provisions of this title apply.

5 26 U.S.C. § 7852(e) (emphasis added). The Court agreed with the IRS
6 and dismissed his complaint for lack of subject-matter jurisdiction.
7 Fed.R.Civ.P. 12(b)(1). He filed a motion urging the Court to vacate
8 its order, Fed.R.Civ.P. 60(b), or, in the alternative, reconsider the
9 decision, Fed.R.Civ.P. 59(e). The Court invited the parties to
10 supplement the record. They have done so. Among other things, the
11 IRS has submitted a declaration from Kathryn S. Lopez, who is an IRS
12 Revenue Agent. She alleges that, some years ago, she began
13 investigating whether John Schlabach is liable for unpaid federal
14 income tax and penalties. She alleges that, during the course of her
15 investigation, she acquired the letters to which Mr. Schlabach takes
16 exception. Finally, she alleges she has not completed her
17 investigation. Mr. Schlabach challenges the accuracy of Agent Lopez's
18 final allegation. As authority, he cites a declaration that Derik
19 Hudson, another Revenue Agent, filed in the United States District
20 Court for the Middle District of Louisiana. Agent Hudson declared the
21 IRS has decided to close two investigations concerning Mr. Schlabach.
22 Mr. Schlabach argues that since the IRS has closed its investigations,
23 and since he has no connection to the disputed letters, the Court has
24 jurisdiction over his complaint and should order the IRS to remove the
25 disputed letters from his file. The IRS submits his argument is
26 foreclosed by 26 U.S.C. § 7852(e). According to the IRS, there is no

1 language in the statute requiring the agency to purge its files once
2 it completes an investigation.

3 **RULING**

4 The Court has entered a valid judgment. Mr. Schlachach concedes
5 the Court lacks a basis for vacating the judgment under Rule 60(b)(6).
6 However, he urges the Court to alter or amend the judgment pursuant to
7 Rule 59(e). As the IRS points out, Mr. Schlachach may not use Rule
8 59(e) as a vehicle for rearguing issues the Court resolved against him
9 prior to entering judgment. Rather, in order to qualify for relief
10 under Rule 59(e) (*i.e.*, in order to obtain reconsideration of the
11 order), Mr. Schlachach must demonstrate the Court clearly erred; not
12 just erred, but clearly erred. *School Dist. No. 1J, Multnomah County*
13 *v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) (a district court
14 may alter or amend a judgment if it "committed clear error").

15 The Court dismissed Mr. Schlachach's complaint because, in the
16 Court's opinion, a district court lacks authority to determine which
17 materials the IRS may retain during the course of an investigation
18 regarding a taxpayer's potential liability. Perhaps so, says Mr.
19 Schlachach; but even assuming the Court is correct, he insists the IRS
20 has completed its investigations of him. He argues that, as a result,
21 the Court owes no deference to the IRS. The IRS disagrees. It
22 submits that once one of its agents retains a document as part of an
23 investigation regarding a taxpayer's potential liability for unpaid
24 taxes, district courts are forever barred by 26 U.S.C. § 7852(e) from
25 reviewing the agency's decision to retain the document. To date, the
26 Ninth Circuit has not squarely addressed the issue. Nevertheless,

1 there is some support for the IRS's position. For one thing, §
2 7852(e) contains no language limiting the operation of the statute to
3 ongoing investigations. For another thing, the few decisions that
4 exist tend to support the IRS's position. *See, e.g., Ford v. United*
5 *States*, 981 F.2d 1292 (9th Cir.1992) (**unpublished opinion**).
6 Admittedly, the authorities cited by the IRS are not overwhelming.
7 However, Mr. Schlabach has not demonstrated the IRS's interpretation
8 of § 7852(e) is clearly erroneous. Thus, if the Court erred in
9 dismissing his complaint (a point the Court does not concede), the
10 Court did not commit a clear error of law; and absent a clear error,
11 reconsideration is unwarranted. The Court will deny Mr. Schlabach's
12 request for relief pursuant to Rule 59(e).

13 **IT IS HEREBY ORDERED:**

14 Plaintiff John Schlabach's motion to vacate, or, in the
15 alternative, to reconsider (**Ct. Rec. 25**) is **denied**.

16 **IT IS SO ORDERED.** The District Court Executive is hereby
17 directed to enter this order and furnish copies to Mr. Schlabach and
18 to counsel for the defendant.

19 **DATED** this 23rd day of September, 2010.

20
21 s/ Fred Van Sickle
Fred Van Sickle
22 Senior United States District Judge
23
24
25
26